
In the Matter of:

AREL PRICE,
Claimant

v.

STEVEDORING SERVICES OF
AMERICA
Employer

EAGLE PACIFIC INSURANCE CO., &
HOMEPORT INSURANCE CO.
Carriers

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DECISION AND ORDER

These are claims for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Arel Price (Claimant) against Stevedoring Services of America (Employer), Eagle Pacific Insurance Company (Eagle Pacific) and Homeport Insurance Company (Homeport). The first claim, OWCP #14-108162, is for an injury of October 2, 1991, when Eagle Pacific Insurance Co. insured Stevedoring Services of America. He underwent surgery on April 22, 1992 and returned to work on November 24, 1992. He continued to work until July 2, 1998 when upon the advice of his physician, he left work. The second claim, # OWCP 14-128687, is for a work-related aggravation or progression of his lower back condition, date of injury July 2, 1998. Homeport Insurance Co. has been the insurance carrier for SSA since August 1, 1992.

Homeport alleges that the July 1998 occurrence is a progression; whereas Eagle Pacific alleges that it is an aggravation or new injury. Additionally, I note that Claimant has also suffered a previous low back injury on March 17, 1979, for which he has previously been awarded permanent partial disability benefits and which is not at issue in these present claims.

On May 8, 1998, this matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on November 18, 1999, in Portland, Oregon. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The Administrative Law Judge offered four exhibits, Claimant offered nine exhibits, Eagle Pacific proffered 24 exhibits and Homeport proffered 61 exhibits which were admitted into evidence. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from Claimant, Employer/Eagle Pacific and Employer/Homeport. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

STIPULATIONS

At the commencement of the hearing, the parties stipulated, and I find (Tr. 7-12):

1. That the Longshore and Harbor Workers' Compensation Act applies.
2. That Claimant was injured on October 2, 1991; Eagle Pacific was the responsible carrier for that injury, Claimant was paid temporary total disability benefits from October 3, 1991 to November 23, 1992, and all medical benefits for that injury have been paid.

¹ References to the transcript and exhibits are as follows: Transcript: Tr. __; Claimant's Exhibits: CX-__; Eagle Pacific's Exhibits: EP-__; Homeport's Exhibits: HP-__.

3. That Claimant reached maximum medical improvement on November 23, 1992, for the October 2, 1991 injury.

4. That Claimant last worked for Employer on July 2, 1998.

5. That Claimant was medically stationary on July 3, 1998.

ISSUES

The unresolved issues presented by the parties are (Tr. 12-15):

1. Causation.
2. Nature and extent of disability.
3. Medical benefits.
4. Average weekly wage for both the 1991 and 1998 injuries.
5. Last Responsible Carrier.
6. Section 8(f) Special Fund relief.
7. Section 14(e) penalties, interest and attorney's fees.

STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant is a fifty-eight year old man with a wife and four children. He graduated from high school in 1960 and lives about fifteen miles north of Longview, Washington. (Tr. 54-55). Claimant testified that he became a longshoreman in September 1963 and since that time, he has worked as a longshoreman except for the years from 1976-1978 when he was a commercial fisherman in Alaska. (Tr. 55).

Claimant reported that he was injured in 1979 while working as a longshoreman when he was climbing down a ladder and a rung broke. He reported that he fell on his leg and his right buttock and hit his elbow and jaw. He also hurt his lower back. (Tr. 57). Claimant testified that he had surgery for his

lower back after this injury and that he was off work for two years following the injury. (Tr. 58). He further testified that after his 1979 injury, Dr. John Thompson “could have said that ... [he is] liable to have flare-ups” in his back. (Tr. 93).

Claimant testified that before the 1979 injury, he could do any job at the Longview port and that after the injury, he was limited to light duty jobs. (Tr. 58). He reported that the Longview port is primarily a log export port. (Tr. 59). He further reported that longshoremen go through a union hiring hall to get jobs. (Tr. 59-60).

Claimant reported that he was injured on October 2, 1991, while working for Employer. He testified that during a ship lashing, one of the chains “was kind of fouled, so I held onto a part of the bottom of it so that they could flip it over, which would have been easier if I – I held onto the chain and pulled it against the stanchion so that I actually wasn’t holding much weight, but it would be easier for them to put this chain over the top of the stanchion. And while I was holding onto that, suddenly it fell on my head and my neck and my shoulder, and it – I was standing on the rail of the ship, and it knocked my hat off. It knocked my glasses off. I saw black and sparks, you know, stars, and I – you know, the next thing I saw was – I was losing my balance, and I stepped towards the dock, jumped kind of a jump towards the dock.” (Tr. 56).

Claimant testified that after the accident, he knew he was badly hurt. (Tr. 56). He reported that he went to the supercargo office and told them he was going to have to go to the hospital. Claimant further reported that he received x-rays at the hospital on his neck. He testified that he received compensation from Employer for this injury until January 1992. He further testified that Dr. Berkeley performed neck surgery after this injury and he felt “much better.” (Tr. 57, 91).

Claimant testified that after his 1991 injury, Dr. Berkeley released him to work “with avoidance of repetitive pulling, pushing, lifting and carrying with maximum weight lifting of 25 pounds.” He reported that he tried to comply with the restrictions and if there were jobs he could not handle, he would get assistance. (Tr. 61). He testified that he tried to get sling jobs and dock jobs after the 1991 injury. He reported that sling jobs involve hooking a shackle into a ship’s gear and to a spreader then wrapping slings around loads of logs. (Tr. 62-63). He further reported that the shackles weigh more than twenty-five pounds, so he tried to get help hooking them up to the ship. (Tr. 63).

Claimant testified that it is not uncommon as a gang boss to relieve the slingers four hours a day. (Tr. 200-01). Claimant reported that it was a more difficult job for him to load pre-slung logs and that sometimes he would not do these jobs. (Tr. 201). He testified that he did not have to lift the entire weight of the sling when hooking it up. (Tr. 206). He further reported that it was not uncommon for him, as a gang boss, to carry the paint. (Tr. 202). Claimant testified that he tried to work with people who would help him and work together as a team. (Tr. 209-10).

Claimant testified that on days which he could not do the work due to his injury he would have to

call a replacement. He reported that when he called a replacement, he could not get another job that day. He further reported that he averaged twenty-two days per year when this situation arose and there were no other jobs in the union hiring hall. (Tr. 65). He testified that he did not mention missing these days in his earlier deposition because "it had slipped my mind, and I didn't even think about it until I was asked to find some of my time books..." (Tr. 66).

Claimant testified that his back pain gradually worsened throughout the 1990's. (Tr. 69). He explained that the repetitive pulling of the slings around the logs, stepping over railroad tracks, stepping over bark or mud puddles and enduring jerks from the slings added up gradually increasing his pain. (Tr. 86). For his back symptoms, he reported that he was seeing Dr. Mark Thorson who prescribed pain medication. (Tr. 69-70). He further reported that he went to Canada to get codeine aspirin which, together with his prescription medications, helped alleviate his back pain. (Tr. 70). Claimant testified that in 1993 or 1994, Dr. Thorson described his condition as chronic lumbosacral strain. (Tr. 105).

Claimant testified that he started taking pain medication and working at the same time in the middle 1990's. (Tr. 70). He reported that he told Dr. Thorson about this situation and Dr. Thorson ordered an x-ray and MRI. Dr. Thorson then referred Claimant back to Dr. Berkeley. Claimant testified that Dr. Berkeley recommended that Claimant retire. Claimant reported that he stopped working and his last day of work was on July 2, 1998. (Tr. 71). He further reported that after Dr. Berkeley recommended he retire, he contacted Eagle Pacific Insurance. He testified that Eagle Pacific "said that I needed to get a controversion [form] from them." (Tr. 75).

Claimant testified that he last worked for Employer as a gang boss. (Tr. 71). Claimant reported that he had seen the video of slingman jobs. (Tr. 72). He testified that the video did not show all the things that are required of longshoremen. He reported that the video showed an exceptionally nice and sunny day and the longshoremen were relaxing on their chairs. He noted that the work with the slings is much more difficult than the video shows. (Tr. 87, 203-04). Claimant emphasized that the activities of the workers in the video do not truly represent the kind of work he personally did. For example, he would never have allowed longshoremen to put their chairs close to loads of logs if he were the gang boss. He also noted that the video did not show anyone involved in any particularly difficult work, getting hurt, tweaking their back or stepping over railroad tracks. (Tr. 88). Claimant testified that gang boss work includes flipping around slings, untangling slings and painting on the logs. (Tr. 72-75). He testified that he "seldom" went on ships because if there were logs on the vessel, he would have to climb over them and he "couldn't have done that." (Tr. 109). By "seldom," Claimant explained that meant between once and three times a week. (Tr. 108-109).

Claimant testified that he and his wife are searching for a surgeon to perform surgery. (Tr. 76). Claimant reported that he is receiving social security disability benefits and he has retired as a union member. (Tr. 77, 111). Claimant testified that during 1996 and 1997, he took Darvocet and Vicodin every day for his pain and he "couldn't have worked without these medications." (Tr. 79-80).

Claimant testified that before his 1979 injury, he went horseback riding “at least a couple of days” a week. He reported that his financial situation “wasn’t too bad” at that time because he and his ex-wife were living at a house that his wife’s parents let them use rent-free. (Tr. 81). He testified that after the 1979 injury, he had to take “as many easy jobs as he could” because he had gotten a divorce and “didn’t have anything” so he needed more money. He further testified that he went to the union hiring hall “as much as I could” and he “couldn’t ride horses anymore.” (Tr. 82)

Claimant testified that the union hiring hall is open every day and some holidays. (Tr. 82). He reported that longshore job opportunities have increased since he first became a longshoreman in 1963. He explained that there were around 500 longshoremen in 1963 and now there are only about 200 longshoremen. He testified that he planned to work until he was sixty-five “or whenever as long as I could handle it. I hadn’t really planned on retiring until [Dr. Berkeley] said I should.” (Tr. 83). Claimant reported that a longshoreman needed to work 800 hours per year to have that year qualify toward his retirement pension. He further reported that he believed the same amount of hours were needed to qualify for medical coverage. (Tr. 99).

Claimant testified that his pension benefits did not increase after the 1999 collective bargaining agreement and he has not applied for more benefits from the union. (Tr. 107). He testified that since 1992, his annual earnings increased every year for the exception of 1995 when he was off work three months due to an elbow injury. (Tr. 90).

Michele Price

Michele Price, wife of Claimant, testified that she and Claimant will have been married seven years in February 2000 and that she has known Claimant since approximately 1989 or 1990. (Tr. 42-43). Mrs. Price reported she has been in the nursing field for twelve years and she has been a registered nurse for two years. (Tr. 43).

Mrs. Price testified that as long as she has known Claimant, he has moved slowly and guarded. (Tr. 44). She further testified that after Claimant’s October 1991 injury, “he was in a whole lot of pain. ... he was having sharp pains, and he was – he was not doing well. He was having a lot of difficulties.” Mrs. Price reported that after Claimant’s surgeries in 1992 he was “much better than what he was before he had the surgery, but he was – he was not the same as before the injury.” (Tr. 45). She further reported that he “wasn’t quite as active as he was prior” the injury. (Tr. 46).

Mrs. Price testified that after Claimant went back to work in November 1992, his condition became progressively worse, “not right away but just slowly.” She reported that he could take aspirin and that would take care of his pain. Then, in 1996 or 1997, she further reported that Claimant “started having a whole more pain” for which he was taking prescription medications. Mrs. Price testified that Claimant’s pain “got to the point to where he wasn’t getting enough of the prescription medications where he was still – he was taking over-the-counter medications on top of the prescription medications. And he was having

again a lot of sciatic pain [that] wasn't as severe as prior to when he first had the injury in [1991], but it was progressively getting worse again." Mrs. Price reported that "sometimes [Claimant] didn't even want to get out of bed because his pain was getting bad, and this was just within the last couple of years." (Tr. 46).

Mrs. Price testified that Claimant's doctor was very conservative with the medications, "so [she and Claimant] would go to Canada [and] get codeine, Tylenol with codeine or aspirin with codeine right over the counter ... and [Claimant] was taking a lot of that medication, also." (Tr. 47).

Mrs. Price testified that she and Claimant have a young family with children and that they planned on moving into another home. (Tr. 47). She added that Claimant "was looking forward to working for a couple more years ... to wait until the new [longshore union] contract came into effect ..." (Tr. 47-48). Mrs. Price testified that longshore union contracts are renegotiated every three years and the most recent contract was in July 1999. Mrs. Price further testified that she has had to pay a \$360 medical bill to Dr. Berkeley on behalf of Claimant. (Tr. 48).

Mrs. Price testified that since Claimant stopped working as a longshoreman in October 1998, his back has "slowly progressed but not to the extent as when [Claimant] was working ..." (Tr. 48, 51). Mrs. Price reported that Claimant takes Neurontin, Oxycontin and Darvocet for pain. (Tr. 48-49). She further reported that Claimant has been taking Darvocet since before 1996 for back pain. (Tr. 50-51). Mrs. Price testified that she and Claimant are "in the process of looking for a surgeon right now" for the surgery Dr. Berkeley has recommended. (Tr. 53).

Warren Abell

Mr. Warren Abell, Oregon area claims manager for Homeport, testified that his duties with Homeport involve administering claims filed under the Act, and he has held that position since May 1993. (Tr. 151-52, 164). Mr. Abell testified that Homeport has been the workers' compensation carrier for Employer since August 1, 1992, and that Eagle Pacific was the workers' compensation carrier for Employer before that date. (Tr. 152).

Mr. Abell testified that he had dealt with Claimant before regarding a longshore claim, which was settled pursuant to Section 8(i) of the Act, when Claimant injured his elbow in 1995. (Tr. 152-54). He testified that standard operating procedure vis-a-vis an on-the-job injury was for the employer to fax an injury report to Carrier. Mr. Abell said that occurred for the 1995 injury, but that he never received an injury report stating Claimant was injured on-the-job on July 2, 1998, while working as a gang boss for Employer. (Tr. 153).

Mr. Abell testified that Claimant contacted him via telephone in August 1998. Mr. Abell reported that Claimant stated he was not receiving plan, or off-the-job, benefits. Mr. Abell explained that if the carrier "controvert[s] a claim for an injury, there's benefits that [longshoremen] can get for up to one year. It's not the same compensation rate ... and [Claimant] was having trouble getting his controversion [from

his 1991 claim]. He had an old controversy, but Anthem Health wanted a new controversy and Eagle Pacific Insurance Company wasn't providing that to him, and he was wondering if I could make a phone call to somebody to get another controversy. And I told him at that time there really isn't anything that we can do, because we're not associated with Eagle Pacific Insurance Company." (Tr. 155-56). Mr. Abell testified that this was his only conversation with Claimant regarding this claim. (Tr. 159). He further testified that Claimant never told him that Claimant's back was aggravated. (Tr. 167).

Mr. Abell testified that he first learned of this claim for the 1998 injury when Homeport received the LS-201 and LS-203 from Claimant's counsel. He reported that the claim has been controverted. He further reported that he obtained time sheets and daily reports for the work on July 2, 1998. Mr. Abell testified that obtaining time sheets and daily reports is not standard procedure, but he did it in this case because there were no injury reports filed on July 2, 1998, Claimant had told Mr. Abell that he had retired, and this was a significant exposure for Homeport. (Tr. 156). Mr. Abell reported that there were no indications of any on-the-job accidents or injuries on July 2, 1998, in the daily reports. (Tr. 157).

Mr. Abell testified that he videotaped the operations at the Weyerhaeuser docks. He explained that Exhibit 60, taped on September 10, 1999, involves lunch time activities. (157-58). He testified that he set up the camera on a vessel to tape the operations occurring on an adjacent vessel. (Tr. 157). Exhibit 61, taped on September 15, 1999, involves morning activities. Mr. Abell testified that he did not edit the videos and that they are approximately forty minutes long. (Tr. 158). He further testified that it is his job as claims manager for Homeport to videotape longshore work. (Tr. 165).

Mr. Abell testified that an activity report from July 2, 1998, Claimant's last day of work with Employer, showed that Claimant was a hatch boss, or gang boss, and he worked eight hours that day. The report further showed that Claimant marked off, or painted, logs. (Tr. 163-64).

Don Noel

Mr. Don Noel, superintendent for Employer's Longview office, testified that he is a salaried employee who works with the foreman and the supercargo to direct the labor and ensure a specific job is completed. He stated that he has worked for Employer for twenty-one years. (Tr. 170).

Mr. Noel testified that he has been a superintendent on many jobs where logs were loaded aboard ships. He reported that slingmen are employed to conduct such activities and there are usually two slingmen per hatch. He further reported that gang bosses are also employed during the log-loading activities. (Tr. 171). Mr. Noel explained that there are two slingmen, two crane operators, four holdmen, and one gang boss for each gang. (Tr. 172).

Mr. Noel testified that when he has a job to be done, he conveys the instructions to the foreman, who in turn conveys the instructions to the gang boss. He reported that gang bosses from the dock preference board, such as Claimant, are treated "a little differently" than elected gang bosses because gang

bosses from the dock preference board “don’t do [the job] on a consistent basis.” (Tr. 174-75).

Mr. Noel testified that he had seen the videos of slingman jobs prior to the hearing and based on his experience as a superintendent, the labor being performed in the videos was representative of what slingmen do in the Longview port. (Tr. 175). He reported that logs have become a continuous operation, which means that the longshoremen do not get a coffee break. (Tr. 179). He explained that a shift will be shut down before lunch and after lunch. (Tr. 179-80). Mr. Noel reported that a gang boss will relieve the slingmen for a coffee break and sometimes “if he’s good to them, he’ll turn one of them loose at 11:00, so the guy can go to lunch, and he’ll take the slings until 11:00 or until 12:00, then maybe relieve another one after lunch.” (Tr. 180). Mr. Noel testified that it “happens” that a gang boss will spend four hours helping the slingmen. (Tr. 194).

Mr. Noel testified that a gang boss normally does not have to bring the paint, in one-gallon cans, on board the ship because the ship’s crane takes them aboard. He further reported that the logs in these videos did not have bark on them, so no one would have to worry about stepping over bark in this situation. (Tr. 186). He did report, however, that when there is bark on the logs, it does fall off. (Tr. 186-87). He further reported that the bark can create a hazard for the slingmen and others walking in that area. (Tr. 192-93). He noted that slingmen have a plastic scoop shovel to “kick [the bark] out of the way up against the bunks. When it gets bad enough it’s a problem, the stacker operator will put the bunks out, come in and clean it out, or he’ll definitely do it at lunch time.” (Tr. 187).

Mr. Noel testified that there were no railroad tracks at the berth in these videos. He noted, however, that there were railroad tracks at another berth at the Longview port. (Tr. 187). He testified that those tracks were sunken so that the top is more or less level with the pavement surface. (Tr. 187-88). Mr. Noel reported that from time to time, a sling will need to be replaced if it breaks during the course of a job. (Tr. 190).

Mr. Noel testified that the shackles and the triangle are connected to the ship’s hook by slingmen “and a lot of times the gang boss is there, also.” (Tr. 181). Mr. Noel reported that the sling is “a 7 inch cable ... 40 foot long.” (Tr. 184). He further reported that it is not unusual for the gang boss to help the slingmen get the gear out of the gearbox. (Tr. 194-95).

Karen Fog

Ms. Karen Fog, labor relations representative for Pacific Maritime Association (PMA) in Portland, Oregon, reported, by stipulated testimony dated November 18, 1999, that PMA is a waterfront employers’ collective bargaining agent and the longshore industry’s central payroll processing agent. (HP-62, p. 1; see Tr. 197-99). Employer is a member of PMA. (HP-62, p. 2).

Ms. Fog represents PMA members in the Longview, Washington, Joint Port Labor Relations Committee. She is familiar with the work practices in the Longview longshore union and with the benefits

enjoyed by registered longshore workers. The union maintains a dock preference dispatch board. Longshore workers who take dispatch off that board have first-priority to dock jobs, including slingman and gang boss jobs. Under the collective bargaining agreement, workers on the dock preference board cannot be shifted away from dock work to ship work. (HP-62, p. 2).

Under the Pay Guaranty Plan (PGP), registered longshoremen who have worked the required number of hours in the four previous payroll quarters are entitled to be paid on days when they do not work, provided they check-in with the dispatcher at their hiring hall and are available to work. However, longshoremen are not required to work outside their work category in order to be considered available for work. Therefore, if no skilled jobs are available, skilled workers are available for work even though unskilled jobs may be available. Longshoremen on the dock preference board do not have to take jobs that are not dispatched off that board in order to be available for PGP purposes on days when no dock preference board jobs are available. (HP-62, p.2).

Registered longshoremen must work 800 hours in a payroll year to qualify toward their pension entitlement. To qualify for the basic one-week paid vacation, registered longshoremen must also work 800 hours in a payroll year. A longshore worker must work 800 hours in a payroll year, with 400 of the hours worked in the first half of the payroll year, to qualify for medical benefits. To qualify for paid holidays, a longshore worker must have worked 800 hours in the previous payroll year and he must have been available for work during at least two of the five work days (Monday through Friday) in the payroll week in which the holiday falls. (HP-62, p. 3).

The Medical Evidence

Dr. Edward W. Berkeley

Dr. Edward W. Berkeley, a Fellow of the Royal College of Surgeons of England, testified, by telephonic deposition dated November 3, 1999. (CX-9, p. 108). Dr. Berkeley testified that he is a neurosurgeon with his board certification from the United Kingdom.² (CX-9, p. 109). Dr. Berkeley further testified that he closed his practice in late 1998 and early 1999, and he still has an active license to practice medicine. (CX-9, pp. 109-110).

Dr. Berkeley testified that he first examined Claimant on March 30, 1992, on account of a work-related injury Claimant experienced in October 1991. Dr. Berkeley reported that he received a history from Claimant showing Claimant to be a longshoreman gang boss. Claimant's work activities included "dashing logs with chains and heavy iron chains about 12 feet long." (CX-9, p. 110). Claimant had reported to Dr. Berkeley that one of these chains was dropped by some co-workers and hit him on the head, neck and left shoulder. (CX-9, pp. 110-11). Dr. Berkeley reported that the injury disoriented

² Dr. Berkeley, in his Curriculum Vitae, explained that the Fellow of the Royal College of Surgeons of England is similar to the American Board Certification in a particular speciality. (CX-8, p. 104).

Claimant for a while. (CX-9, p. 111).

Dr. Berkeley reported that when the chain fell on Claimant, Claimant “wrenched his lower back and the pain in the low back was masked with a severe headache and neck ache which was a direct impact on his body by the chain.” He testified that Claimant was taken to St. John’s Hospital in Longview, Washington, after the accident where he was x-rayed and a brain scan was taken. (CX-9, p. 111). Dr. Berkeley further reported that Claimant went to a doctor the following day because he still had very severe neck and left shoulder pain. He testified that Claimant also had severe low back ache and pain radiating down both legs, right side being worse than the left. (CX-9, p. 112).

Dr. Berkeley testified that Dr. Miller, a neurosurgeon in Vancouver, Washington, obtained a cervical MRI and recommended conservative treatment and physical therapy.³ He reported that Claimant’s low back and neck symptoms persisted so that a lumbar MRI scan was performed in November 1991. Dr. Berkeley further reported that Dr. Douglas Thompson at Southwest Washington Hospital administered epidural injections to Claimant’s lower back that gave Claimant only temporary relief. (CX-9, p. 112).

Dr. Berkeley testified that Claimant was then examined by Dr. John Thompson, an orthopedic surgeon in Portland, and had further physical therapy, massage, ultrasound, a TENS unit and anti-inflammatory medications. Dr. Berkeley reported that Claimant was put on isometric exercise, but he did not improve. (CX-9, p. 112).

Dr. Berkeley testified that Claimant was then referred in February 1992 to Dr. Michael Calhoun, a neurosurgeon, and a cervical MRI was performed that showed Claimant had cervical spondylosis at C-6, 7. Dr. Berkeley reported that Dr. Thompson sent Claimant back to him for further evaluation. Dr. Berkeley testified that he recommended lumbar decompressive surgery for Claimant. (CX-9, p. 113).

Dr. Berkeley testified that he based his opinion to recommend surgery for Claimant on Claimant’s severity of pain as well as his inability to do anything without having severe pain radiating down his right leg. He noted that Claimant had “very limited lumbar movement and very limited straight leg raising. And the MRI scan did show prolapsed intervertebral disk at L-5, S-1 as well as narrowing of the lateral recess on the foramen at this level...” Dr. Berkeley concluded that Claimant be treated with microdiscectomy at L-5, S1 and he performed that surgery on April 21, 1992. (CX-9, p. 114).

Dr. Berkeley explained that microdiscectomy was an aggressive surgery accomplished via very small instruments. He emphasized that a more effective decompression is made under the microscope than with the naked eye or with a magnifying hoop. (CX-9, pp. 114-15). Dr. Berkeley testified that the decompression involves removing part of the bone, scar tissue and ligaments that can be compressing the

³ Counsel for Claimant noted that Dr. Miller’s first name is Jay and not Jane as it appears in the deposition of Dr. Berkeley. (Tr. 212).

nerve root in the lateral recess which is where the nerve is and processes through in order to go to the leg. He further testified that “discectomy is the removal or the partial removal of the disk that had ruptured and was now occupying the space which [sic] it shouldn’t be normally physiologically there. The disk is contained between the two vertebrae. If that material of the disk is extruded into the canal, it impinges upon the nerve root, which is the immediate neighbor of the disk. And therefore it causes nerve compression and consequently, pain, weakness, numbness and so on.” (CX-9, p. 115).

Dr. Berkeley testified that he was aware that Dr. Thompson had operated on Claimant in 1979 at the L4-5 level, but the scar tissue he removed was not from that surgery because he was operating at the L-5, S-1 level. Dr. Berkeley reported that he did not have access to, nor could he see, the L4-5 level. (CX-9, p. 116). He testified that “within probability” Claimant would be left with some permanent impairment either from the 1979 decompressive surgery at L4-5 or the 1979 accident. (CX-9, p. 117).

Dr. Berkeley reported that the 1992 surgery achieved two results. First, it decreased the intensity of Claimant’s pain and his inability to walk or do anything without being severely incapacitated. Second, Claimant was eventually able to return to work again as a longshoreman, though with some limitations. (CX-9, pp. 116-17). Dr. Berkeley testified that when he released Claimant in 1992, Claimant was essentially symptom-free, in that he had no significant debilitating symptoms from either his neck or low back for at least the four years following 1992. (CX-9, p. 128).

Dr. Berkeley reported that the limitations he prescribed after the 1992 surgery were a maximum lifting of twenty-five pounds and avoidance of or repetitive bending, pulling, pushing, lifting and twisting suddenly or any severe overloading of the spine vertically. (CX-9, pp. 117-18). He explained that he “didn’t want [Claimant] to jump from heights and compress his spine vertically or have ... heavy things carried on his shoulders and things like that.” He testified that he placed these restrictions on Claimant “predominantly to avoid precipitation of further symptoms because as a result of such trauma or subliminal trauma in small quantities repetitively, you get increasing and acceleration of the degeneration of the spine and arthritic formations and so on.” (CX-9, p. 118). He further reported that the injury Claimant suffered in 1979 of falling off the ladder is the kind of incident with the kind of loading which he wants Claimant to avoid. (CX-9, pp. 118-19).

Dr. Berkeley testified that it is “medically probable” that even before the 1979 accident, Claimant already had some degenerative changes in his spine. (CX-9, p. 119). He further testified that in a patient, like Claimant, where there are at least two levels where the foramen are tight and the nerve is already irritated, it is predictable that there will be a continuing cycle of irritation of that nerve, regardless of initial good results from surgeries. (CX-9, pp. 119-20).

Dr. Berkeley testified that when he saw Claimant on July 3, 1998, Claimant was complaining mainly of “difficult with his low back and the ability to walk or do any type of physical activity without developing severe and increasing low backache, right and left-sided leg ache as well – the right being the predominant one – abnormal sensations were then called dysesthesias, which are pins and needles, tingling, numbness

and cold and hot sensations in the right toes, stabbing pain in the low back and severe muscle spasms. Dr. Berkeley reported that Claimant did not refer to any specific incidents or accidents that occurred between 1992 and 1998. (CX-9, p. 131).

Dr. Berkeley observed that “[t]he most important symptoms that [Claimant] had was neurogenic claudication, that is, limping as a result of increasing pain and weakness developing in the legs when he tried to walk. And his walking distance was limited between three and four blocks. He had difficulty walking up hill or also doing steps, going up stairs particularly rather than downstairs. These were his complaints.” (CX-9, pp. 120-21).

Dr. Berkeley explained that neurogenic claudication develops from pain in the back and both legs. Dr. Berkeley reported that Claimant had more pain in his right leg than his left. He testified that the essence of the neurogenic claudication is a circulatory problem, with oxygen not reaching the tissues, and what causes the circulatory deficit can be the narrowing of the canal, the osteophytic bone formations and scar tissue. (CX-9, pp. 122, 135). He further reported that the 1979 and the 1992 surgeries created scar tissue that combined with the other conditions to cause the neurogenic claudication. (CX-9, pp. 122-23).

Dr. Berkeley testified that when the joints in the spine are loaded with unusual or higher forces than the joint can tolerate, small tears and hemorrhages are produced and there is a nonspecific inflammatory response that brings more cells to the area. (CX-9, pp. 136-37). The increase of these cells to the proximity of the nerve tissue and the blood vessels causes a narrow canal to develop and, therefore, the neurogenic claudication. (CX-9, p. 137).

Dr. Berkeley testified that Claimant has a “degenerative condition in the lumbar spine causally related from the first injury of ‘79 and aggravated by the second injury of ‘91. And the cumulative effect of – first of all, the two operations, the scarring and the interference with his spine mechanics, the way we did the surgery because you can never do surgery without disturbing some of the normal anatomy and also causing some scar tissue even with microsurgery. Number two, the normal progression of the degenerative disease that started at these two accidents and progressed as the patient aged. Number three, the additional subliminal trauma, the daily trauma that he had as a result of his physical activities at work even with the limitations that I imposed on him that he continued to work as a longshoreman, which is essentially a very physical job, and it – sometimes considerable lifting, and twisting and jogging his spine more than one would expect in a more sedentary job. All these three factors have been making the narrowing of the canal. What you are seeing is really a condition which starts insidiously and initially, it waxes and wanes and then becomes more and more steady. It becomes more severe and progressively becomes more debilitating. So, the person who can walk say, five or six blocks suddenly finds himself that he can walk only three blocks or four blocks or progressively even less than that and has more pain and more weakness in the legs.” (CX-9, pp. 129-30).

Dr. Berkeley testified that he has recommended surgery for Claimant to relieve his pain. He opined that the only way to give Claimant relief would be to decompress both levels at L4-5 and L-5, S-1 and to

limit the decompression to the right side only as it was the place where Claimant had the most symptoms. (CX-9, p. 123). Dr. Berkeley reported that he has not seen Claimant since recommended surgery. (CX-9, p. 124).

Dr. Berkeley testified that Claimant's back disability is wholly attributable to an industrial injury which began with the first injury in 1979 and the second injury in 1991. (CX-9, pp. 124-25). He further testified that Claimant's condition is progressive and would be even in the absence of Claimant's longshoring work. (CX-9, p. 125). He reported that Claimant's condition became more and more debilitating particularly from 1996 to 1998. (CX-9, p. 128). He further testified that Claimant's work activities during the two to three years prior to July 1998 hastened the need for the surgery he has recommended for Claimant and has hastened the development of his degenerative condition. (CX-9, p. 132). He further reported that he has recommended surgery on patients, with similar back conditions as Claimant, who do much more sedentary work than Claimant. (CX-9, p. 126).

Dr. Berkeley testified that Claimant's condition was probably accelerating before 1996, but "you cannot be specific as to when it started causing problems except from the symptoms. It is something that you cannot quantify and cannot objectively find. We have to go by, in fact, the patient's narrative again that he's okay initially. Then, he's not so okay. Then gradually, he's getting worse and nothing helps medically." (CX-9, pp. 131-32).

Dr. Berkeley testified that Claimant's complaints "are totally in accordance with what one would expect with the severity of the pathological changes that one saw in the MRI scan. The whole situation is very straightforward, very simple and fits exactly to this type of pathological condition." (CX-9, pp. 132-33).

Dr. Berkeley testified that it is his medical opinion that Claimant's trauma occurred during the period prior to Claimant's 1998 examination and commenced or occurred earlier than his reported symptoms that began in 1996. (CX-9, p. 141).

Dr. Jon C. Vessely

Dr. Jon C. Vessely, board certified orthopedic surgeon, testified that he currently does legal consultations and does not see patients for medical treatment. (Tr. 125). He testified that he and Dr. William Smith, a neurosurgeon, examined Claimant "a couple of months ago" for low back pain and right-sided radicular pain in Claimant's thigh and calf. (Tr. 113-15). Dr. Vessely reported that Claimant "had a very slow type controlled gait. He had pain on almost all our maneuvers, even maneuvers that would not really put a lot of stress on his back. There was significant limitation of motion of his spine, which would not really be in congruence with the films and the problem. By that, I meant he only flexed 5 degrees where normal flexion is 60 degrees. He only extended 5 degrees, normal extension is 25. We would not expect (sic) a normal range of motion, but we would have expected more than he demonstrated." (Tr. 115-16).

Dr. Vessely testified that he and Dr. Smith “did not note any objective neurological deficits. [Claimant’s] reflexes, both the knee and ankle jerk, were quite normal. There was no evidence of pathological reflex. He had some inconsistency in straight leg raising. He had more pain when we attempted to do the straight leg raising with him supined than with him sitting.” (Tr. 116).

Dr. Vessely reported that Claimant’s “musculature did not show any significant atrophy.... The right side only showed one centimeter decreased right calf compared to left. His motor strength would all rate in the 5/5 range.” (Tr. 116).

Dr. Vessely explained several objective tests, used to detect “symptom magnification” for pain, that were conducted on Claimant. The Lewin maneuver involves having the patient kneel and then slightly bend forward. By the fact that the patient is kneeling, and has his knees at ninety degrees of flexion, all the tension is taken off the hamstrings and very little is on the back. The patient should experience no pain. The Marxer test involves placing the patient in the prone position and flexing his knee up. All the tension is off the hamstrings and back. Again, the patient should experience no pain. However, Dr. Vessely reported that Claimant experienced pain with both tests. (Tr. 117).

Dr. Vessely illustrated that symptom magnification was different from malingering. Malingering is a psychological condition where the patient is consciously trying to mislead the physician. Dr. Vessely did not think that Claimant was trying to mislead Dr. Smith or himself. Dr. Vessely explained that symptom magnification affects his recommendations for treatment and whether a particular patient is a good surgical candidate. (Tr. 118, 119). Because of his findings from the Lewin and Marxer tests, Dr. Vessely noted that he was “hesitant to recommend surgical treatment.” (Tr. 118). Dr. Vessely acknowledged that physicians will disagree and noted that Dr. Berkeley had recommended surgery for Claimant. (Tr. 119).

Dr. Vessely reported that Claimant has degenerative changes at L5-S1 and that is where Dr. Berkeley recommends the surgery. Dr. Vessely observed that, historically, the medical literature had stated when a patient describes his work activities as being heavy, there is no occupational cause of degenerative changes in the lumbar spine. However, “some literature coming out now ... shows people in very heavy occupations – and heavy occupations usually means that you’re lifting well over 50 pounds and will occasionally lift over 100 pounds – might have higher incidence of degenerative change.” Dr. Vessely testified that this may apply to Claimant’s situation. (Tr. 121). He noted, however, that Dr. Smith “strongly felt that there was no occupational relationship to the changes in [Claimant’s] case.” (Tr. 121-22).

Dr. Vessely testified that he had seen the videos of slingman jobs and had reviewed the job analyses of slingman jobs prepared by Mr. Weiford. Dr. Vessely concluded that slingman jobs do not constitute the kind of work that the recent literature associates with degenerative changes in the lumbar spine. (Tr. 122). Dr. Vessely further testified that he had read Dr. Berkeley’s testimony and he believed that it did not relate to what Dr. Vessely saw in the videos or read in the job analyses. Dr. Vessely pointed out that Dr. Berkeley was referring to “fairly significant physical activities...such as riding...playing very aggressive basketball, football, rugby and skydiving. I do not feel that those are any way related to the type

of activities that I viewed on the tapes of the slingman occupation.” (Tr. 124).

Dr. Vessely reported that transcending a gangway to board and disembark a ship would not cause degenerative changes in the lumbar spine. He testified that, in his opinion, Claimant’s work as a gang boss and slingman has not added to the degenerative changes in his lower back and has not hastened the need for surgery. (Tr. 125). He further testified that his opinion is based to a large extent to what he saw in the videos. (Tr. 127).

Dr. Vessely testified that the surgery that Claimant had following the 1991 injury “made him more disposed to have later changes in his back.” He concurred that the 1991 injury “moved the normal progression along a little faster than it other wise would have gone on by itself[.]” Dr. Vessely reported that after he examined Claimant, it was his opinion that Claimant should not go back to longshoring; however, after seeing the video of slingman jobs, he feels that work is within Claimant’s capabilities depending on how Claimant perceives the pain. (Tr. 128).

The Vocational Evidence

Thomas Weiford

Mr. Thomas Weiford, a vocational counselor, testified that most of his work in the last four to six years has focused on catastrophically impaired individuals and individuals with spinal cord and traumatic brain injuries. He reported that he evaluates, tests, coordinates with physicians, and works with many adaptive equipment specialists. He further reported that a lot of his work is outside of the Portland area. (Tr. 132).

Mr. Weiford testified that he is a consultant with the Seattle and Portland Public schools when they want information vis-a-vis evaluations of autistic and traumatically brain injured individuals. Moreover, Mr. Weiford teaches rehabilitation counseling in the graduate program at Portland State University. He testified that some of his work involves testifying in litigation involving tort or workers’ compensation claims. He reported that most of his work is for plaintiff attorneys. (Tr. 132-33). He further reported that most of his testimony in longshore cases has been for employers. (Tr. 150).

Mr. Weiford testified that he had been to the Longview port approximately ten to twelve times in the last three years to observe and takes notes regarding Employer’s cargo operations. (Tr. 133, 149). He reported that he would sometimes spend half days and sometimes full days at the port. (Tr. 148). He further testified that he has had the opportunity to observe the activities of slingmen and gang bosses on these trips. (Tr. 134).

Mr. Weiford reported that he prepared job analyses of slingmen and gang boss jobs for Homeport based on what he had seen at the Longview port and what he had read in the collective bargaining agreement. (Tr. 134-35). Mr. Weiford testified that he had not seen the videos of slingman jobs when he

prepared the analyses. (Tr. 136).

Mr. Weiford testified that he “would have some pause” with regard to his analyses after having viewed the videos. For example, he testified that under slingman, he would change vis-a-vis twisting from “occasionally” to “rare to occasionally” based on what he saw in the videos. Also, he would change vis-a-vis walking and standing from “occasionally and frequently” to fifty percent walking and standing and fifty percent sitting based on what he saw in the videos. (Tr. 136-37). Mr. Weiford explained what he meant by “would have some pause” was that “maybe I was mistaken...I think that maybe I need to give more time to take a look at these duties.” (Tr. 146).

Mr. Weiford testified that he had not spoken to Claimant about what his job duties entailed. (Tr. 146-47).

Mr. Weiford noted that the weight of the slings varies from five pounds to over twenty-five pounds. He testified that he picked up the slings himself. He further testified that he was shown around the Longview port by superintendents and longshoremen. (Tr. 140). He reported that it was his understanding that when a slingman takes a break, the gang boss works as a slingman. (Tr. 143). He further reported that he has never observed repetitive twisting by slingmen and gang bosses. (Tr. 147).

Mr. Weiford testified that he is not permitted to talk directly to the longshoremen. He stated that he usually talks to superintendents and dock bosses. (Tr. 149).

The Contentions of the Parties

Claimant contends that he suffers from a degenerative condition in his lower back that was accelerated by his work as a gang boss with Employer thereby contributing to his early retirement. (Tr. 24).

Eagle Pacific contends that Claimant’s attending physician released Claimant to return to work in 1992, when Eagle Pacific went off the risk, and if this is an aggravation case thereby resulting in a new and discrete injury, the last responsible carrier should be liable. (Tr. 32-33).

Homeport contends that Claimant wants to receive a higher pension from the longshoreman’s union and he needs a controversion of his claim to obtain the necessary hours to qualify. (Tr. 35). Homeport further contends that Claimant’s work as a gang boss does not amount to the kind of work that leads to the progression of a degenerative condition in the lumbar spine. (Tr. 38).

DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'd, 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Causation

Section 20(a) of the Act, 33 U.S.C. § 920(a), creates a presumption, absent substantial evidence to the contrary, that a claimant's disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, a claimant must prove that he suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated or accelerated the condition. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). Substantial evidence means more than a scintilla, more specifically, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971).

Section 20(a) also provides in pertinent part, "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary...that the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). As the Fourth Circuit has noted, "the presumption is a broad one, and advances the facility with which claims are to be treated to further the Act's purpose of compensating injured workers regardless of fault. But that procedural facilitating device is not a substitute for substantive evidence which an injured worker must present to be entitled to compensation." Universal Maritime Corp. v. Moore, 126 F.3d 256, 262, 31 BRBS 119 (CRT) (4th Cir. 1997); See also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 614.

A claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS (5th Cir. 1982).

Claimant has established sufficient evidence to invoke the Section 20(a) presumption. I find Claimant's consistent reports of lower back pain to be credible. Moreover, Dr. Berkeley credibly stated

that Claimant's back disability is wholly attributable to an industrial injury. Therefore, a harm could have resulted in the manner described by Claimant. Consequently, Claimant has invoked the Section 20(a) presumption.

Thus, Claimant has established a *prima facie* case that he suffered an "injury" under the Act, and that his working conditions and activities could have caused the harm or pain for causation sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the worker's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). "Substantial countervailing evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. E & L Transport Co. v. N.L.R.B., 85 F.3d 1258 (7th Cir. 1996). Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. Brown v. Jacksonville Shipyards, Inc., 893 F.2d 294 (11th Cir. 1990) (upholding the Board's "ruling out "standard, i.e., unless a causal connection is ruled out, there is no direct concrete evidence sufficient to rebut the §20(a) presumption). Cf. Conoco Inc. v. Director, OWCP, 194 F.3d 684 (5th Cir. 1999) (Section 20(a) does not require a "ruling out" standard.).

According to the Board, an employer is not required to establish another agency of causation in order to rebut the Section 20(a) presumption. O'Kelley v. Department of the Army/NAF, 34 BRBS 39 (2000); see Stevens v. Todd Pacific Shipyards, 14 BRBS 626 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983), cert. denied, 467 U.S. 1243 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, the employer must establish that the claimant's condition was not caused or aggravated by his employment. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

In this case, Employer has not presented facts or substantial countervailing evidence to rebut the presumption that Claimant's employment did not cause, contribute to, or aggravate his condition.

Employer alleges that Claimant's job as a gang boss does not amount to the kind of work that aggravates or leads to the progression of a degenerative condition in the lumbar spine, but Dr. Berkeley credibly stated that Claimant's back disability is wholly attributable to an industrial injury. Since Employer did not establish that Claimant's condition was not caused, in part, or aggravated by his employment, the Section 20(a) presumption still applies. Rajotte, supra. Accordingly, the record is devoid of any evidence rebutting Claimant's invocation of the Section 20(a) presumption.

B. Nature and Extent of Disability

The burden of proving the nature and extent of his disability rests with the claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an “incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” 33 U.S.C. § 902(10). Therefore, for the claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have suffered either no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984).

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988). The claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once the claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 fn. 5 (1985); Trask v. Lockheed Shipbuilding Constr. Co., *supra*; Stevens v. Lockheed Shipbuilding Constr. Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the

medical evidence of record. Ballesteros v. Williamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395, 401 (1981).

Temporary total disability

The parties have stipulated that Claimant was entitled to temporary total disability benefits from October 3, 1991 until November 23, 1992 for the October 2, 1991 injury. (For this injury Claimant reached maximum medical improvement (MMI) on November 23, 1992.)

Maximum medical improvement

On November 18, 1992, Dr. Berkeley reported that Claimant would be medically stationary on November 23, 1992, and could return to work on that date. Claimant was advised to avoid repetitive pulling, pushing, lifting and carrying with maximum weight lifting of 25 pounds. (EP Ex. 23, p. 340).

Permanent partial disability

Claimant has raised the issue of permanent partial disability from November 23, 1992 until July 2, 1998 (when he alleges he became permanently totally disabled). Eagle Pacific has objected to the raising of this issue, alleging that it was raised untimely and that Claimant's testimony at the hearing regarding the economic impact of turning down "catwalk" jobs "was untimely and prejudicial."

Dr. Berkeley assigned restrictions in 1992 to avoid precipitation of further symptoms. (CX 9, p.118). Dr. Berkely testified that in 1992, following his surgery, Claimant was symptom-free and had no significant debilitating symptoms from either his neck or low back for at least four subsequent years. (CX 9, p. 128).

Claimant testified that when he was released to work after the 1991 injury, he tried to stay within Dr. Berkeley's restrictions and if there was something he could not handle, he would get help. (TR. 61). Claimant testified that he even took slingman and dock jobs (the more physically demanding jobs) when he knew he would be working with certain people. (Tr. 62). He stated that it was difficult to do the sling jobs within Dr. Berkeley's limits. Some of the shackles weighed over 25 pounds and he would try to get help to hook them up. (TR. 63).

Claimant testified that after returning to work in 1992, he was able to do all of the light duty jobs he performed before the 1991 injury with one exception. (TR. 69, 63). Claimant testified that he turned down “catwalk” jobs an average of 22 days a year after the 1991 injury.

As noted above, Eagle Pacific argues that Claimant’s claim for permanent partial disability benefits based on his refusal to take catwalk jobs is untimely. To this end, Eagle Pacific notes that my pre-trial order stated that all evidence must be exchanged 30 days prior to the hearing, and that parties must be notified and given the opportunity to present argument and new evidence on a new issue which arises during the course of a hearing. 20 C.F.R. § 702.336(b).

However, at his deposition in September 1999, Claimant testified that he could not handle catwalk jobs but he also said that he had worked as much before the surgery as after the surgery. (HP Ex. 58, p 474). In other words, prior to this hearing, Claimant claimed no loss of income or work from his refusal to take catwalk jobs. Then, at the formal hearing, he claimed he turned down catwalk jobs an average of 22 days a year and there were no other jobs he could take. Claimant claims these 22 days equal 176 hours over 52 weeks, or 3.38 hours per week and that he has a loss of wage-earning capacity of \$73.62 per week ($3.38 \times \21.78 straight time hourly rate as of October 2, 1991). This in turn would equate to a permanent partial compensation rate of \$49.08 per week ($2/3 \times \73.62).

As I noted previously, Claimant stated that he checked his time books the night before and made the above noted calculations. The time books were not offered as evidence or otherwise produced.

While Eagle Pacific argues that this issue was raised untimely and that it was unable to examine the evidence or cross-examine claimant about his calculations, I find the issue of permanent partial disability to have been timely raised. In any event, on its merits, I find that the evidence does not support a conclusion that Claimant suffered any loss of job opportunities or loss of wages as a result of the October 2, 1991 injury. First, as I have just previously stated, claimant did not offer the time books into evidence. Therefore the only evidence on permanent partial disability is the testimony of Claimant and this testimony is confusing and contradictory. At one point Claimant stated, “I worked probably just as much [before and after the October 2, 1991 injury]. I think, just as much.” (Homeport X 58, p.474 (p. 42 of Arel Price Depo. Of September 27, 1999).

When asked if he did not take catwalk jobs, would he take something else, Claimant answered, “No. I’d not work at all because I’d take something else, yeah....” In the “Affidavit of Charles Robinowitz In Opposition To Eagle Pacific’s Motion To Strike, Mr. Robinowitz stated, “Although Mr. Price lost his catwalk work, his overall work hours were still high due to his persistence in working regularly with pain.”

I further note that Claimant testified that jobs for longshoremen have, in fact, increased because there are fewer longshoremen and more work opportunities. The number of hours that Claimant worked in 1996 (1815 hours) and 1997 (1819 hours) were comparable to the number of hours worked in 1990 (1864 hours) and do not support a conclusion that he lost opportunities to work as a result of refusing

catwalk jobs. Therefore, I find that the evidence of record on this issue does not support the conclusion that Claimant was permanently partially disabled in relation to the October 2, 1991 injury, after he reached MMI for it.

Permanent total disability

Employer, through both Eagle Pacific and Homeport, contends that Claimant has been released to work by his attending physician and, furthermore, as a gang boss, he did not perform the kind of work that leads to the progression or aggravation of a degenerative condition in the lumbar spine. (Tr. 32, 38). Employer points to the medical evidence provided by Dr. Vessely that tests performed on Claimant showed a certain degree of symptom magnification being experienced by Claimant. (See Tr. 117). Based on the results of these tests, Employer notes, that Dr. Vessely opined that Claimant is experiencing pain he should not; therefore, he was hesitant to recommend surgical treatment for Claimant. (Tr. 119). Dr. Vessely further indicated that, after viewing the videos of gang boss work, he believes Claimant's work is not the kind that leads to the degenerative changes in the lumbar spine. (Tr. 122). He further opined that Claimant can do gang boss work within the prescribed restrictions. (Tr. 128).

Claimant's attending physician, Dr. Berkeley, on the other hand, opined that Claimant has experienced neurogenic claudication from the degenerative changes in his lower back. (CX-9, pp. 122, 135). This condition has cut-off oxygen to certain tissues and narrowed the spinal canal; thus, causing progressively increased pain to Claimant. (See CX-9, pp. 120-23). This condition, combined with the scar tissue from Claimant's earlier surgeries, has hastened the need for surgery and hastened the development of his degenerative condition. (CX-9, pp. 129-32). Dr. Berkeley noted that Claimant's condition became more and more debilitating particularly from 1996 to 1998, (CX-9, p. 128), and furthermore, that Claimant's complaints "are totally in accordance with what one would expect with the severity of the pathological changes that one saw in the MRI scan. The whole situation is very straightforward, very simple and fits exactly to this type of pathological condition." (CX-9, pp. 132-33).

Dr. Berkeley further reported, on July 3, 1998, that Claimant "had reached the stage where he will not be able to work as a longshoreman, because of this progressive disease and gradual deterioration in his lumbar spine..." (CX-6, p. 89-91).

I find Dr. Berkeley's medical findings to be reasonable and appropriate based on his reasoned opinions and analyses as set forth in his testimony and medical reports. Furthermore, Dr. Berkeley is Claimant's attending physician, and examined him on numerous occasions. Dr. Vessely examined Claimant on a single occasion. (Tr. 113-15). Pursuant to the decision of the Ninth Circuit in Amos v. Director, OWCP, 153 F.3d 1051 (9th Cir. 1998), amended 164 F.3d 480 (9th Cir. 1999), I have given greater weight to the opinion of Claimant's treating physician. See also, Pietruni v. Director, OWCP, 119 F.3d 1035 (2nd Cir. 1997). Therefore, based on Dr. Berkeley's medical opinion, I find and conclude that the weight of the evidence indicates that Claimant is permanently and totally disabled under the Act and that he became so on July 3, 1998. Thus, I find that Claimant reached **maximum medical improvement**

(MMI) for the 1998 injury on July 3, 1998.. (As to who is responsible for Claimant's permanent total disability, see below at "D. Last Responsible Carrier.").

C. Medical Benefits

An employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. Mayfield v. Atlantic & Gulf Stevedores, 16 BRBS 228 (1984); Dean v. Marine Terminals Corp., 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978). A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment. Gilliam v. The Western Union Telegraph Co., 8 BRBS 278 (1978).

In Shahady v. Atlas Tile & Marble, 13 BRBS 1007 (1981), aff'd, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc., 15 BRBS 299 (1983); Beynum v. Washington Metropolitan Area Transit Authority, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. Atlantic & Gulf Stevedores, Inc. v. Neuman, 440 F.2d 908 (5th Cir. 1971); Matthews v. Jeffboat, Inc., 18 BRBS at 189 (1986).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), Claimant may not recover medical costs incurred. Betz v. Arthur Snowden Company, 14 BRBS 805 (1981). See also 20 C.F.R. § 702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. Roger's Terminal, supra.

In this case, Claimant has had to pay a \$350.00 medical bill to Dr. Berkeley and is actively searching for a surgeon to perform the surgery recommended by Dr. Berkeley. (Tr. 48, 53, 76). Because Dr. Berkeley has credibly testified that Claimant is in need of surgery, I find and conclude that Employer/Homeport must compensate Claimant for all reasonable medical expenses in connection with his lower spine injury and is liable for the reasonable costs of such a surgery. (See below for finding that Employer/Homeport is the Last Responsible Carrier.)

D. Last Responsible Carrier

In aggravation cases, the responsible employer/carrier is the one for whom the claimant worked when the last injury or aggravation occurred. If the disability is the result of the natural progression of an earlier injury, the responsible employer/carrier is the one for whom the claimant worked at the time of the earlier injury. However, if the disability is the result of a new injury that has aggravated, accelerated, or combined with the prior injury to result in the present disability, the responsible employer/carrier is the one for whom the claimant worked at the time of the new injury. Foundation Constructors v. Director, OWCP, 950 F.2d 621 (9th Cir. 1991).

In Foundation Constructors, the Ninth Circuit, in whose jurisdiction this case arises, upheld the Benefits Review Board's determination that claimant's back condition was aggravated during his employment with Foundation even though such degeneration was the result of injuries claimant had sustained while employed with another employer. 950 F.2d at 624. The Ninth Circuit recognized that the aggravation "rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since 'all employers will be the last employer a proportionate share of the time.'" Id. at 623 (quoting General Ship Service v. Director, OWCP, 938 F.2d 960, 962 (9th Cir. 1991)).

In this case, the new injury was the cumulative trauma Claimant experienced to his back while working as a longshoreman. Claimant's physician, Dr. Berkeley, testified that when he released Claimant in 1992, after the surgeries, Claimant was essentially symptom-free, in that he had no significant debilitating symptoms from either his neck or low back. (CX-9, pp. 117-18). Dr. Berkeley then reported that the daily subliminal trauma of Claimant's work activities during the two to three years prior to July 1998 hastened the need for the surgery he has recommended and has hastened the development of his degenerative condition. (CX-9, p. 132). Moreover, Claimant and his wife's reports of increased pain beginning around 1996 exemplified by Claimant's increased intake of medications for pain during this time support Dr. Berkeley's conclusion that Claimant's work activities hastened and accelerated his need for surgery.

Based on the foregoing, I find that Claimant experienced a new injury that aggravated, accelerated, or combined with his prior injuries to result in the present disability. Therefore, I find and conclude that Homeport is the responsible carrier as Homeport was on the risk during the time that claimant worked when the last injury or aggravation occurred. See Foundation Constructors, supra.

E. Average Weekly Wage

Since there were 1991 and 1998 injuries in this matter, average weekly wage determinations must be made for both dates.

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual

earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Orkney v. General Dynamics Corp., 8 BRBS 543 (1978); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

The statute sets a high threshold and requires the application of Section 10(a) or (b) except in unusual circumstances. Section 10(a) is the presumptively proper method for calculating average weekly wage and must be employed unless it would be unfair or unreasonable to do so. Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can[] reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821 (5th Cir. 1991).

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

1991 AWW

Claimant's deposition was taken on March 3, 1993 for purposes of the October 2, 1991 injury claim. At that time he had been back at work for three months. He testified that he went back to work in November 1992 and was still on the dock preference board, which he had been on since 1985 due to the effects of the 1979 injury. It offered employment in a limited category of jobs such as sling man and

gang boss. Claimant was on the board for the day shift, which had about 25 people on it. (EP Ex. 15, pp.194-195). He further testified that he accepted a night-time short duration job every once in a while and that he was as available for work since the November 1992 injury as he was before his injury in 1991. (EP Ex. 15, p 197). Claimant testified that he turned down jobs in 1991 before his October injury, because of back problems. (EP Ex. 15, p 229), and that the jobs he took that related to log-loading operations were that of gang boss, slingman and boatman (when he had a boat).

At the time of the October 2, 1991 injury, the employer/carrier for Claimant's 1979 injury was attempting to have his permanent partial disability benefits modified. (The hearing was held on October 23, 1991, three weeks after the October 2, 1991 injury. Judge Schneider concluded that there was no evidence that the wage increases were permanent since the amount of work fluctuated based on economic conditions. He therefore denied the employer's petition for modification and found that Employer had failed to establish that there was a change in Claimant's wage earning capacity. Judge Schneider concluded that in 1991, Claimant had a residual wage-earning capacity of \$333.87 per week as a longshoreman. This decision was appealed to the Board.

Subsequently, the claim for the October 2, 1991 injury proceeded to hearing on April 6, 1993, before Judge Schreter-Murray. The parties stipulated that Claimant was medically stationary on November 24, 1992 from the October 2, 1991 injury. (H Ex. 55, pp.382-383). Judge Schreter-Murray determined that the pending of the Board appeal (of the Order on the Petition for Modification) complicated the issue of calculating Claimant's average weekly wage and justified a remand of the claim until disposition of the appeal. (H. Ex. 55 pp. 408-409).

On April 21, 1993, the October 2, 1991 injury claim was remanded to the OWCP (HP Ex. 56). In a Decision and Order dated September 9, 1996, the Board affirmed Judge Schneider's denial of the employer's petition for modification and upheld Judge Schneider's finding of a \$333.87 residual wage-earning capacity.

I find that the law of the case doctrine does indeed apply here and therefore, Claimant should be precluded from arguing that he had a higher wage earning capacity than the amount Judge Schneider had determined was his wage-earning capacity as a result of the October 23, 1991 modification hearing. The \$333.87 wage-earning capacity was affirmed by the Board and is binding since there was a full and fair adjudication of the issue before Judge Schneider. [Judge Schneider had noted an average weekly wage of \$627.88 for Claimant's earlier 1979 injury. Thus he had found Claimant entitled to a compensation rate of \$196.01 per week, based on 66 2/3 percent of the difference between his average weekly wage of \$627.88 and his wage-earning capacity of \$333.87 (H Ex. 53).] Thus, Claimant's average weekly wage (AWW) as of October 2, 1991 was his residual wage-earning capacity of \$333.87.

July 1998 AWW

Employer/Homeport argues that Claimant's average weekly wage should be calculated using

Section 10(c) of the LHWCA while Claimant argues that Section 10(a) should be used. Homeport first alleges that Claimant is bound by his pre-hearing contention that his average weekly wage is \$ 1,156.15, calculated using Section 10(c). Homeport, citing 29 CFR §18.51, argues that this pre-hearing contention should be taken as an offer to stipulate, which Homeport allegedly accepted by making the same contention in its pre-hearing statement. However, Section 18.51 of the Rules of Practice and Procedure states as follows:

The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations may be received in evidence at a hearing or prior thereto, and when received in evidence, shall be binding on the parties thereto.

Since no such stipulation was either “agreed upon” nor received into evidence, this pre-hearing contention cannot be binding on the parties.

Claimant argues that Section 10(a) should apply although this results in some “overcompensating” because it bases Claimant’s annual earnings on a daily wage multiplied by 260 without regard to the number of days actually worked during the preceding year. For support, Claimant cited Matulic v. Director, OWCP, 154 F.3d 1052, 32 BRBS 148 (CRT) (9th Cir. 1998). Matulic stated in part:

Due to the fixed formula Congress adopted under § 910(a), in most benefits cases there will be a degree of inaccuracy in the estimation of the worker’s earning capacity—ordinarily the error will favor the worker and ordinarily there will be some overcompensation, at least in theory, although in other respects the statutory formula may benefit the employer.

32 BRBS at 151(CRT). For instance, application of the fixed formula benefits the employer in cases such as this where the statutory maximum compensation rate serves to limit the compensation for a high earnings wage earner to a maximum compensation rate regardless of the claimant’s AWW.

Matulic further noted that “Flexibility and the resolution of doubts in favor of the worker is the rule rather than rigid mathematical certainty.” Furthermore, Matulic went on to state:

When Congress amended section 910 of the Act in 1948 to reflect the five-day work week, it undoubtedly was aware that virtually no one in the country works every working day of every work week; there are many reasons including illness, vacation, strikes, unemployment, family emergencies, etc. We can infer that Congress knew that both subsections (a) and (b) would result in some overcompensation, but retained the 260-day factor for administrative convenience.

Matulic at 1057. The Ninth Circuit, citing Duncanson-Harrelson Co. v Director, OWCP, 686 F.2d 1336

(9th Cir. 1982), vacated on other grounds, 462 U.S. 1101, 103 S.Ct. 2446 (1983), concluded that when a claimant works more than 75 per cent of the workdays of the measuring year, the presumption that Section 10(a) applies is not rebutted. However, the court further noted that it did not mean to suggest that a figure that is 75 per cent or lower will necessarily result in the application of Section 10(c) since there may be other circumstances which demonstrate that a reduction in working days during the one-year period preceding the worker's injury is atypical of the worker's actual earning capacity.

Employer/Homeport argues that Claimant's employment was "intermittent and casual" and therefore, Section 10(c) is controlling. To this end, Employer/Homeport notes that Claimant works from job to job out of a hiring hall, that he is hired on a rotational basis and not by name, and that his employment varies from week to week. According to Employer/Homeport, this puts Claimant squarely within the holding of the Ninth Circuit in Marshall v. Andrew F. Mahony Co., 56 F.2d 74, 77-78 (9th Cir. 1932)(AWW calculations when the worker's employment is "intermittent and casual" must be made under Section 10(c)). Employer/Homeport argues that the Ninth Circuit in Matulic did not overrule Mahony and therefore Mahony must be followed.

While it is correct that Matulic did not overrule Mahony, it is also clear that Matulic is a better expression/interpretation by the circuit court of Congressional intent in this area, and, as will become obvious, Matulic is pertinent to the fact situation at hand. Since I do not find that Claimant's employment was "intermittent and casual," Mahony is not controlling. Claimant, like other longshoremen, worked from job to job out of a hiring hall, on a rotational basis. If Claimant had to be classified as an intermittent and casual worker, so would every other longshoreman.

I find that Section 10(a) should apply for the following reasons. There is no question that Claimant worked substantially the entire year prior to October 2, 1991. Employer/Homeport admits that Claimant worked 197 days during the 52 weeks before July 2, 1998. Claimant was a five-day-per-week worker, and 197 days is 75.7 per cent of 260 days. Where a work record exceeds 75 per cent of the claimant's potential, the Ninth Circuit requires a calculation of the AWW pursuant to Section 10(a). See Matulic, supra. These work days do not include vacations or holidays. Wooley v. Ingalls Shipbuilding, 33 BRBS 88 (1999).

However, even if Claimant had worked less than 75% of his potential, he would not necessarily be excluded from application of Section 10(a). The court in Matulic stated, "We do not mean to suggest that a figure that is 75% or lower will necessarily result in the application of §910(c). There may be other circumstances which demonstrate that a reduction in working days during the one-year period preceding the worker's injury is atypical of the worker's actual earning capacity." 154 F.3d at 1058. Matulic then notes some of these circumstances.

Among those exemplified in Matulic is the fact that employment in the Seattle port was not seasonal or intermittent, but rather was stable and continuous. The Matulic court compared the facts of its case with Palacios v. Campbell Industries, 633 F.2d 840 (9th Cir. 1980) (noting that longshore work may be

considered intermittent if there is evidence that the port is closed seasonally or for fixed periods of time). In fact, in holding that Section 10(a) rather than 10(c) applied, the Matulic court concluded, “To reach the conclusion urged by [the stevedoring employer], we would be required to conclude that no longshoreman working out of Seattle is employed continuously and none is entitled to have his average weekly wage computed under the presumptive formula of the Act. The record does not support such a drastic holding.” 154 F.3d 1058.

I find that in the instant case, there is no evidence that the port was closed seasonally or periodically. Claimant’s employment was stable and continuous. Accordingly, applying Matulic, Section 10(a) provides the proper method of calculating Claimant’s average weekly wage.

However, Claimant argues that Brady-Hamilton Stevedore Co. v. Director, OWCP, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995) should apply. Brady-Hamilton stated that although the principal factor in determining AWW is the salary earned by the claimant prior to the injury, the projected loss of earnings may be inaccurate because factors like inflation and a change of wage rates or benefits may bear upon the amount of earnings lost. “Where a worker is injured for the second time, any award made for the first injury should be disregarded if more reliable information concerning the worker’s earning capacity has become available. 58 F.3d at 421.

In Brady-Hamilton, the matter was remanded so that the ALJ could determine the reason for the increase in the claimant’s weekly wage. If the increase was due to factors other than an increased wage-earning capacity, the claimant was entitled to keep both of his awards. If on the other hand, the claimant’s wage-earning capacity had increased in the year of the second injury, this would require some adjustment of the earlier award.

Claimant argues that his increased earnings after the 1979 injury, and after adjustments for contract increases, were not due to any change in his earning capacity. Claimant notes that he did not acquire any new job skills or seniority positions. He attributes the increase to four reasons unrelated to a change in wage-earning capacity. First, his work habits changed substantially after the 1979 injury. Although his physical abilities were limited in terms of the work he could perform on the waterfront, his willingness to work increased substantially because of his increased financial need and his inability to enjoy his previous hobby of horseback riding.

The second reason for an increase is that Longview, Washington, is primarily a wood-exporting port, and the work opportunities for longshore workers depend on the volume of shipping in the port, as well as the number of available registered longshoremen. Claimant testified that the number of registered longshoremen in Longview had decreased from approximately 500 in the 1970’s to approximately 200 today, and this decrease has created substantially more work opportunities for the remaining longshoremen. (TR. 82-83).

Third, the hourly rate of pay for longshore workers has increased. A final reason for the increase

is that calculations pursuant to Matulic include some overcompensating and Claimant's average weekly wage in 1979 was not calculated pursuant to Matulic.

Applying Brady-Hamilton to the instant case, I find that I must view Claimant's present increased earnings capacity as not having been based on an increased wage-earning capacity, but rather, as having been based on the four reasons previously noted. As I previously noted, Brady-Hamilton states, "Where a worker is injured for the second time, any award made for the first injury should be disregarded if more reliable information concerning the worker's earning capacity has become available." 58 F.3d at 421. I find that such information is available. (HP Ex. 9, pp. 57-63).

During the period July 3, 1997 through July 2, 1998 (last day worked), Claimant earned \$60,119.97. (HP Ex. 9, pp. 57-63). Of this, \$13,386.35 was holiday pay (\$2,670.72), vacation pay (\$6,163.20) and pay guaranty plan pay (PGP) (\$4,552.43). During that time Claimant worked 197 days. (Id.).

Homeport argues that under Section 10(c) the compensation rate would be as follows:

$$\$60,119.97/52 = \$1,156.15 \text{ [AWW]} \times .6667 = \$770.81.$$

However, Homeport also argues that, if Section 10(a) applies, the calculation of Claimant's AWW must be based only on his earnings during days when he worked and that therefore, the formula would be

$$(\$60,119.97 - 13,386.35 \text{ (Holiday, vacation \& PGP pay)}) / 197 = \$237.23 \text{ average daily wage.}$$

When the average daily wage of \$237.23 is multiplied by 260 [number of days a five day per week worker works in a year], the result is \$61,679.80. Dividing this by 52 weeks in a year, would yield an average weekly wage of \$1,186.15, using Homeport's method. Two-thirds of \$1,186.15 would, in turn, equal a compensation rate of \$790.81, again using Homeport's method.

Previously, I have explained why Section 10(a) should be applied in this case. Now I will address the actual application of calculating Claimant's 1998 AWW. Section 10(a) looks to the actual wages of the injured worker as the monetary base for determination of the amount of compensation. Jurisprudence under the LHWCA defines "wages" as including vacation and holiday pay, as well as guaranteed annual income payments. Sproull v. Stevedoring Services of America, 25 BRBS 100 (1991); Duncan v. Washington Metro. Area Transit Auth., 24 BRBS 133, 136 (1990); Rayner v. Maritime Terminals, 22 BRBS 5 (1988); Waters v. Farmers Export Co., 14 BRBS 102 (1981), aff'd per curiam, 710 F.2d 836 (5th cir. 1983); McMennamy v. Young & Co., 21 BRBS 351, 354 (1988).

Therefore, I find that, under Section 10(a), Claimant's 1998 average weekly wage is \$1,156.15 (\$60,119.97/52), and his compensation rate would be \$770.81 (\$1,156.15 x .6667).

Furthermore, I find that since Claimant's 1998 AWW was not due to an increased wage-earning capacity, he remains entitled to his 1979 permanent partial disability award payable by Eagle Pacific as well. I also note that, technically, Claimant is entitled to keep his permanent partial disability claim open. However, I note that an adjustment may have to be made to Claimant's permanent total disability compensation rate since the combined effect of his award against SAIF Corporation (a permanent partial award) and a permanent total award against SS of A/Homeport cannot exceed 66 2/3 per cent of Claimant's compensation rate under Section 8(a) of the LHWCA as the Ninth Circuit and the Board both require. See Brady-Hamilton, 58 F.3d 419, 29 BRBS 101 (CRT) (9th Cir. 1995) and Hansen v. Container Stevedoring Co., 31 BRBS 155 (1997). It is axiomatic that a claimant may not be more than totally disabled. See Rupert v. Todd Shipyards Corp., 239 F.2d 272 (9th Cir. 1956); Hoey v. Owens-Corning Fiberglas Corp., 23 BRBS 71 (1989).

In Crum v. General Adjustment Bureau, 738 F.2d 474, 480 (D.C. Cir. 1984), the court upheld an award of 15 percent for partial permanent disability for a neck injury and a later total permanent disability award for angina. The Board adjusted the total permanent disability award to account for the 15 percent partial disability award so that the total compensation did not exceed the statute limitation. Crum also states, "Under the court's decision in Hastings v. Earth Satellite Corp., 628 F.2d 85, 91 (D.C. Cir.), cert. denied, 449 U.S. 905, 101 S.Ct. 281 (1980), the benefits for a total disability are calculated by evaluating the wage-earning capacity that remains after the partial permanent disability is accounted for." (Id.).

Where a claimant sustains an injury which results in an award of permanent partial disability and subsequently suffers a second injury which results in a permanent total disability, he may receive concurrent awards for the two disabilities. See Hastings v. Earth Satellite Corp., 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), cert. denied, 449 U.S. 905 (1980); Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989). See also, ITO Corp. v. Director, OWCP, 883 F.2d 422, 426-27 (5th Cir. 1989). The concurrent awards combined cannot exceed the 66 2/3 percent of AWW maximum of Section 8(a).

In Hansen, the Board noted that the total of the claimant's total disability benefits and partial disability benefits awards exceeded the statutory maximum under Section 6(a) of the LHWCA. The maximum 1998 compensation award allowable is \$871.60. I find that if an adjustment must be made in order not to exceed the maximum allowable rate, the SAIF Corporation weekly payments should be credited against any weekly liability of Homeport.

F. Section 8(f) Special Fund Relief

As noted previously, I found that Homeport, and not Eagle Pacific, was the Responsible Carrier in the matter of the July 2, 1998 injury. While Eagle Pacific pursued Section 8(f) relief (as to its own defense of both the October 2, 1991 and July 2, 1998 claims), there is no evidence that Homeport has raised this issue even in the alternative. (I note that during the litigation Homeport argued that there was not a new injury and that in its pre-hearing summary, Homeport stated that Section 8(f) was "Not [an issue]

as to SS of A/Homeport.”) Noting Homeport’s failure to address Section 8(f) and realizing that occasionally, for economic reasons, parties deliberately do not pursue Section 8(f) relief, I am inclined not to address this issue.

G. Section 14(e) Penalty, Interest and Attorney’s Fees

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer filed a timely notice of controversion on September 8, 1998. In accordance with Section 14(b) of the Act, Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.⁴ Thus, Employer was liable for compensation on September 14, 1998. Since Employer controverted Claimant’s right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801 n. 3 (1981). A notice of controversion should have been filed by September 28, 1998, to be timely and prevent the application of penalties. Thus, I find and conclude that Employer filed a timely notice of controversion on September 8, 1998.

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff’d in pertinent part and rev’d on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board has concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and has held that “...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills...” Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Claimant’s attorney, having successfully prosecuted this matter, is entitled to a fee assessed against

⁴ Section 6(a) does not apply since Claimant suffered his disability for a period of more than fourteen days.

Employer.⁵ Counsel for Claimant is hereby allowed twenty (20) days from the date of service of this decision to submit a petition for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Eagle Pacific shall pay Claimant temporary total disability benefits from October 3, 1991 until November 23, 1992, for the October 2, 1991 injury, based on an average weekly wage of \$333.87. Therefore, said compensation rate for this injury shall be \$222.58.

2. Employer/Homeport shall pay Claimant compensation for permanent total disability from July 3, 1998, and continuing, based on the average weekly wage of \$1,156.15, in accordance with the provisions of Section 8(b) of the Act, 33 U.S.C. § 908(b), and the maximum allowable compensation rate as stated in Section 6 of the Act. 33 U.S.C. § 906. Claimant's previous permanent partial disability award for the 1979 injury payable by SAIF remains in effect. To the extent necessary, if combined payments of Homeport and SAIF exceed the maximum allowable compensation rate, Homeport is to receive a credit against the amount payable by SAIF.

3. Employer/Homeport shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's lower spine injury, pursuant to the provisions of Section 7 of the Act. 33 U.S.C. § 7.

4. Employer/Homeport shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc., 22 BRBS 46 (1989); Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984), on recon. 17 BRBS 20 (1985).

⁵ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after May 8, 1998, the date the matter was referred from the District Director.

5. Employer/Homeport shall receive credit for all compensation heretofore paid, as and when paid.

6. Claimant's counsel shall have twenty (20) days to file a fee petition with the Office of Administrative Law Judges; a copy must be served on Claimant and all opposing counsel who shall then have twenty (20) days to file any objections thereto.

JOHN M. VITTON

Chief Administrative Law Judge

Dated: October 13, 2000
Washington, D.C.

JMV/jla